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No. 82-254

In the Supreme Court of the United States

OCTOBER TERM, 1982

HOSPITALITY MOTOR INN, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. The Board found that petitioner violated Section 8(a)(5) and 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and 158(a)(1), during negotiations for a bargaining agreement, by refusing to bargain in good faith with the newly-certified Hotel and Restaurant Employees & Bartenders Union, Local No. 235 ("the Union") (Pet. App. 14-34).[1] Although petitioner and the Union held 10 bargaining sessions between May 1978 and January 1979, no agreement resulted. The Board found that the totality of petitioner's bargaining conduct, including, *inter alia*, its refusal to consider a union security provision, a union dues

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[1]The Board also found that petitioner violated Section 8(a)(1) of the Act by promoting an employee in order to curtail her union activities. The petition raises no question concerning this finding (Pet. 6 n.3).

checkoff provision, a no-discrimination clause, and a prohibition on individual contracts, as well as its insistence on a very broad management rights clause, "establishes that [petitioner] engaged in bargaining without a good faith intent and effort to 'resolve differences and reach a common ground' with the Union" (*id.* at 27). The Board ordered petitioner, *inter alia*, to "[b]argain in good faith with [the Union]" (*id.* at 32).

2. The court of appeals (Judge Weick dissenting) upheld the Board's decision and enforced its order (Pet. App. 11-13). The court concluded that the Board's finding that petitioner failed to bargain in good faith was supported by substantial evidence (*id.* at 12). Judge Weick disagreed with the majority's conclusion that the Board's findings were supported by substantial evidence (*id.* at 13).

3. Petitioner does not challenge the court of appeals' conclusion that substantial evidence supports the Board's overall finding that petitioner failed to bargain in good faith with the Union (Pet. 6). Rather, petitioner raises only the question whether "substantial evidence supports the particular findings that the company's failure to grant a no-discrimination clause as well as the company's refusal to agree to a unilateral union security clause and a dues check-off clause should be included as forming a part of the company's illegal refusal to bargain conduct" (*ibid.*). That issue does not warrant review by this Court.

Petitioner does not (and could not) contend that nondiscrimination, union security, and dues checkoff are not appropriate subjects for bargaining. See, *e.g.*, *Emporium Capwell Co.* v. *Western Addition Community Organization*, 420 U.S. 50, 69 (1975); *Atlas Metal Parts Co.* v. *NLRB*, 660 F. 2d 304, 308 (7th Cir. 1981). Nor does petitioner suggest that the Board may not consider a party's bargaining positions in the course of determining whether

there has been a violation of the obligation to bargain in good faith.[2] It is well established that, while a party to bargaining negotiations is not required to make concessions or to yield fairly maintained positions, the Board may consider the substance of the party's positions in determining whether it has met its obligation to bargain in good faith. See, *e.g.*, *H. K. Porter Co.* v. *NLRB*, 397 U.S. 99, 100-101 (1970); *id.* at 110 (Harlan, J., concurring); *NLRB* v. *Holmes Tuttle Broadway Ford, Inc.*, 465 F. 2d 717, 719 (9th Cir. 1972); *Kayser-Roth Hosiery Co.* v. *NLRB*, 430 F. 2d 701, 702-703 (6th Cir. 1970); *NLRB* v. *Reed & Prince Manufacturing Co.*, 205 F. 2d 131, 134 (1st Cir.), cert. denied, 346 U.S. 887 (1953). This Court has recognized that "the Board has been afforded flexibility to determine * * * whether a party's conduct at the bargaining table evidences a real desire to come into agreement." *NLRB* v. *Insurance Agents' International Union*, 361 U.S. 477, 498 (1960). Such a determination requires the Board to draw inferences from relationships between the parties, antecedent events, and the "course of negotiations." *NLRB* v. *Truitt Manufacturing Co.*, 351 U.S. 149, 155 (1956) (Frankfurter, J., concurring in part and dissenting in part). The finding that a party has failed to bargain in good faith normally is a matter for the judgment of the Board. *Ibid.*

In this case the Board concluded that the totality of circumstances, including petitioner's intransigent positions on a variety of issues, indicated an absence of good faith bargaining on petitioner's part.[3] Petitioner's contention

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[2]Indeed, petitioner does not contest the Board's bad faith finding with respect to the individual contracts proposal and the management rights proposal (Pet. 6 n.3).

[3]As the court of appeals noted (Pet. App. 11-12), petitioner stated its opposition to the Union repeatedly during the negotiations. See Pet. App. 19-24.

that it was justified in refusing to agree to no-discrimination, union security, and dues checkoff provisions merely reflects disagreement with the Board's judgment (Pet. App. 14 n.1, 24-27) that petitioner's positions were not proffered in good faith, but rather with an intent to frustrate agreement. The court of appeals correctly found that substantial evidence in the record supports the Board's conclusions. That evidentiary issue does not warrant review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

Petitioner contends (Pet. 7-8) that the effect of the Board's order is to require petitioner to include certain clauses in any agreement it may reach with the Union. This contention reflects a misapprehension of the Board's order.[4] The order could not, and does not, require petitioner to agree to any particular proposals. See *H. K. Porter Co.* v. *NLRB*, *supra*. Instead, it simply requires petitioner to bargain in good faith by, *e.g.*, entering into discussions

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[4]The Board's opinion indicates that it was not the refusal to agree to no-discrimination, union security, or dues checkoff clauses in itself that led to the Board's finding of a failure to bargain in good faith, but rather the totality of petitioner's conduct during the course of the negotiations. Indeed, the Board's opinion states specifically that the Act does not require an employer to agree to union security and checkoff provisions (Pet. App. 26). Moreover, the Board's concern was not simply with the content of petitioner's positions, but also with the reasons offered in support of those positions (*id.* at 26-27). For example, petitioner justified its position on union security and dues checkoff on the basis of "philosophical" reasons and a concern that local students would be discouraged by such provisions. The Board concluded that the former justification did not satisfy the statutory obligation to bargain in good faith, and that petitioner had presented no evidence to support the latter reason (*id.* at 26, 20 n.1). Petitioner argued that a no-discrimination clause was unnecessary because the law already prohibits such conduct—a reason the Board found insufficient to preclude consideration of such a contractual obligation enforceable through grievance processes, especially in light of the fact that no-discrimination clauses are commonly included in bargaining agreements (*id.* at 26-27).

with an open mind and abandoning any bargaining positions that are held for the purpose of frustrating agreement. To the extent that petitioner has legitimate reasons to support its bargaining positions, the order in no way precludes it from asserting those reasons. There is no need for this Court to assure petitioner about the proper interpretation of the Board's order.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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